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79-1381

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1979

RAPHAEL ESPARZA-CORRAL, RAUL ESPARZA-CORRAL and ANASTACIO ESPARZA-CORRAL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on January 14, 1980, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding all three petitioners guilty of the distribution of a controlled substance, heroin, in violation of Title 21, United States Code, Section 841(a)(1). They were sentenced to the custody of the Attorney General of the United States for a period of eight (8) years to be followed by a special parole term of three (3) years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 4, 1979, without opinion and is not reported. The unpublished order of the United States Court of Appeals for the Seventh Circuit, not to be cited pursuant to Circuit Rule 35, entered on January 14, 1980, No. 79-1400, is set forth in the Appendix.

JURISDICTION

The unpublished order of the United States Court of Appeals for the Seventh Circuit was filed on January 14, 1980, and a timely petition for rehearing was denied on February 8, 1980. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Did the trial court violate petitioners' rights pursuant to the confrontation clause by admitting hearsay testimony into evidence?
2. Were petitioners' Sixth Amendment rights violated as a result of the trial judge advising the prospective jurors during voir dire that the petitioners were Mexican citizens?
3. Did the Government prove the crime charged in the indictment?
4. Was the standard applied by the Seventh Circuit in determining the sufficiency of circumstantial evidence to support a conviction in conflict with that of other circuits?
5. Was the closing argument of the Government an improper comment on petitioners' failure to testify?

STATEMENT OF THE CASE

The petitioners were charged in a one count indictment returned by the grand jury on April 11, 1978. This indictment charged that the petitioners and Augustin Lopez-Morales (hereinafter sometimes referred to as "Lopez") knowingly and intentionally distributed approximately 1998.09 grams of a mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance on or about March 2, 1978, at Chicago, Illinois, in violation of Title 21, United States Code, Section 841(a)(1).

Lopez entered a plea of guilty to the indictment prior to the commencement of the trial, and, therefore, is not a party to this proceeding.

The three petitioners were found guilty after a jury trial on March 1, 1979.

The evidence presented by the Government showed that on March 2, 1978, Cesar R. Palma, a special agent of the Drug Enforcement Agency (D.E.A.) met with Lopez at about 12:30 P.M. at Fran's Tavern, 23rd and Western Avenue, Chicago, Illinois to discuss a heroin transaction (T.[1]91). Palma was going to buy two kilos of heroin at a price of $28,000.00 per kilogram (T.102).

Lopez said that he wanted half the money for the heroin before he delivered any. Palma told Lopez that it would be impossible and that he was not going to give him any of the money before it was delivered (T.92). Lopez said that he didn't think he could get his people to

[1] "T" refers to the Transcript of Proceedings of the trial court.

deliver the heroin without the money. Palma then told him to bring him a kilogram of the heroin and that he would pay for that when it was delivered and then Lopez could go back to his people and get the other kilogram. Lopez did not indicate who the people were who he had to go through to get the heroin.

The two left the tavern, got into Lopez' Chevrolet and drove over to Palma's vehicle in the A & P parking lot (T.93). They then got out of Lopez' vehicle, and Palma took a rimless tire from his truck and put it in Lopez' car. It had previously been agreed that this would be used as a means of carrying the heroin. Lopez then drove Palma back to the tavern, and Palma told him that he would wait for him for an hour at the tavern and that Lopez should call him at the tavern. Lopez left the tavern area at about 1:00 P.M. (T.94).

After dropping Palma off in front of Fran's, Lopez drove to the middle of the 2500 block of South Harding where he parked his car and entered the El Farol Tavern which was on the corner of 25th and Harding at about 1:00 P.M. (T.186). At about 1:45 P.M. he came out of the tavern, walked to his car, went into the driver's side of the car for about a minute and went back into the tavern.

At about 2:00 P.M. Lopez called Palma at Fran's and said that "everything was set, that everything was all right, not to worry about anything and to please wait" (T.94).

The three petitioners came out of the El Farol Tavern at about 2:05 P.M. (T.187, 214, 272). Anastacio got into Lopez' Chevrolet while Raul and Raphael got into a Toronado, Raphael in the driver's seat and Raul in the passenger's (T.188-190). Both cars were driven to the

2600 block of South Kildare. The Toronado was parked on the west side of Kildare about in the middle of the block, slightly to the north of Lopez' car which was parked on the east side of the street (T.191-192).

Anastacio got out of the Chevrolet, walked to the rear and opened the trunk. Raphael and Raul got out of the Toronado (T.193). Raphael opened the trunk of the Toronado, stood at the rear of the car and looked northbound. Raul removed a gray metal tool chest from the trunk and walked across Kildare to the Chevrolet where Anastacio was standing and placed the tool chest in front of him on the bumper. The tool chest was about one and a half feet long and six inches deep.

Anastacio reached into the trunk, stood up the rimless spare tire with his left hand (T.194) and put the packages in the trunk (T.195). The packages were about six to eight inches long, cylindrical in shape and covered with a light masking tape.

Raul then closed the tool chest and put it into the trunk of the Chevrolet (T.196). Anastacio then laid the tire down in the trunk and Raul walked back to the Toronado. Anastacio then closed the trunk, went to the driver's side of the Chevrolet for a very short time and then walked over and entered the Toronado. The three then drove away in the Toronado at about 2:30 P.M. (T.197).

At about 2:50 P.M., Lopez walked up to the Chevrolet, got into the driver's seat and came right out. He then walked back to the trunk of the car, opened it, looked inside, closed it and then he got back into the car and drove back to the A & P parking lot at 22nd and Western (T. 198). Lopez parked near Agent Palma's truck. He opened the trunk of his car, removed the spare tire and put it

into the rear of Agent Palma's truck and walked over to Fran's.

Inside Fran's, Lopez told Palma that it was in the trunk and everything was ready (T.96). Palma told Lopez to leave the tavern and to meet him by the truck (T.97). Palma then alerted his surveillance agents, left Fran's and went to his truck in the parking lot. He removed one of the four cylindrical packages from the tire, broke it open and conducted a field test. The test was positive. He then gave a prearranged arrest signal and Lopez was arrested (T.98).

Other agents arrested the petitioners at the Rodeo Lounge located at 30th and Pulaski (T.200).

The defense did not present any witnesses.

REASONS FOR GRANTING THE WRIT

1. The Trial Court Violated Petitioners' Rights Pursuant To The Confrontation Clause By Admitting Hearsay Testimony Into Evidence.

During the course of the trial, the trial judge improperly permitted the Government to introduce testimony relating to conversations between Lopez and Agent Palma that took place outside the presence of the petitioners (T.91-94). Prior to the start of the trial, the petitioners made a motion *in limine* to exclude such conversations (T.6-9). However, the trial judge did not rule on the motion at that time (T.9).

In the opening statement of the prosecutor to the jury, references were made to conversations between Lopez and Agent Palma; and when the trial judge overruled defense counsel objections, he stated that the petitioners would have a standing objection to any testimony about Lopez (T.75). Later, before testimony began, the trial judge stated, "So you can have a standing objection about anything from Lopez and I am going to let it all in and we will see what happens" (T.85).

At the close of the Government's case, the prosecutors moved for the admission of these statements on the grounds that the Government had established by a preponderance of the evidence the existence of a joint venture. In agreeing with the Government, the trial judge stated (T.430-431):

> "THE COURT: Well, I believe that a joint venture among all four defendants has clearly been established here by the evidence that I have heard, and the government has clearly met the Santiago burden

of proving concerted action by a preponderance of the evidence.

I will grant you that I have heard no contrary evidence, and it sometimes seems anomalous to talk about a preponderance where you only hear evidence on one side. But I have already been informed that the defendants will present no evidence as a practical matter, so it is not a real problem.

Moreover, I think that with the exception of the statements that there are other people involved, there really is no hearsay, or there are no statements which require the conspiracy exception to the hearsay rule to be applied here. But to the extent that the statements indicating the existence of other people may be regarded as having hearsay character, I think that the Santiago test has been met here. I also do not think it is necessary to instruct the jury on the question of joint venture or anything of that kind.

I am disinclined to give the instruction that the government offered, but I do think that the aiding and abetting instruction should be given."

The court also stated that "this is just simply a case of aiding and abetting defense" (T.432).

However, the evidence did not show that there was a joint venture to distribute heroin to Agent Palma between Lopez and the petitioners. Rather, at most, it showed two separate and distinct distributions—one between Lopez and Palma and the other between Lopez and the petitioners.

The only testimony tending to connect the petitioners with the distribution charged in the indictment; that is, a distribution of heroin to Agent Palma by Lopez and the petitioners was the testimony of Agent Palma relating to the fact that Lopez had told him that he (Lopez) did not think he could get his people to deliver the heroin

without the money (T.92). Without this testimony, the record would have been silent as to any evidence tending to establish that the petitioners knew what Lopez was going to do with the heroin, if indeed they were the "his people" he was referring to in his conversation with Palma.

In reaching the conclusion "that a preponderance of the evidence, independent of testimony about conversations between Palma and Lopez, suggests a joint venture," the court below was relying upon inferences and assumptions not warranted from the trial court record. This court has long condemned the practice of "piling inference upon inference" to establish an essential element of proof. See *Ingram* v. *United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320.

To establish the requisite concerted action or joint venture, it was essential that the evidence prove that the petitioners were aware of Lopez' purpose to distribute the heroin to Palma and that they performed some acts to bring about the success of that transaction.

However, the record is silent as to any independent evidence establishing the fact that the petitioners were aware that Lopez intended to distribute the heroin to Palma. There was no evidence presented in the trial court to show that the petitioners ever met with Lopez to discuss a heroin transaction nor were they ever in the company of Lopez when he discussed the heroin transaction with Palma.

To sustain its conclusion, this court relies primarily on the Government's argument that "if Lopez and defendants were *not* working together [it is unlikely] that Lopez would give the Esparzas in advance some $50,000 and

his car and then trust them to subsequently deliver the heroin, or that the Esparzas would put $50,000 worth of heroin in Lopez' car and then trust Lopez to later deliver the money."

However, this argument is untenable based upon the trial record. There was no testimony as to whether the petitioners did or did not receive any money from Lopez nor was there any testimony to the effect that they ever were going to receive any money from him. This argument further assumes that the heroin in question belonged to the petitioners which, of course, was not proved in the trial court. To assume that the heroin belonged to the petitioners is not a reasonable inference to be drawn especially in view of the fact that ownership of the car from which the heroin was transferred to Lopez' car was never established. Had ownership of this car been shown to belong to the petitioners, this would be a strong circumstance to support such an assumption. However, for some unknown reason evidence relating to the ownership of the second car was not presented by the Government.

The fact that they "abandoned Lopez' car with the keys inside" would also tend to establish that they had no knowledge of the contents of the packages and that they had no concern about what was done with the packages after they were transferred to Lopez' car.

Had they been aware of the contents of the packages and had the heroin belonged to the petitioners, it is unlikely that they would have left the area of Lopez' car after the transfer and would have remained in the area to insure that Lopez retrieved the car and not some thief especially in view of the fact that the transfer was made in broad daylight in the presence of others traveling up and down the street.

Although the court below stated that Lopez retrieved his car within a few minutes, it was actually 20 to 25 minutes later which is a long time fc omeone to leave such a valuable commodity in a car with the keys in it.

It is strange that with all of the surveilling government agents in the area at the time of the occurrence, no one testified as to what happened in the Ed Farol Tavern during the forty-five minutes that Lopez was in the tavern prio to the existing of the petitioners. There was no evidence that Lopez talked with the petitioners regarding the heroin in the second car or whether he talked to someone else in the tavern who might have been the owner of the second car. Had one of the petitioners owned the second car, it is reasonable to assume that the Government would have presented such evidence; and since no such evidence was presented, it is reasonable to infer that the second car did not belong to them.

From the evidence presented at the trial, it is just as reasonable to conclude that the petitioners were merely doing an innocent favor for an acquaintance without knowledge of the fact that they were engaging in an illegal transaction.

Without the hearsay statements of Lopez to Palma, the "preponderance test" as enunciated in *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978) to determine whether a conspiracy or joint venture has been proven so as to permit admission of a co-conspirator's (Lopez) statements would not have been satisfied. In determining whether the "preponderance test" has been satisfied, the trial judge cannot consider the very hearsay statements for which admission is sought.

In admitting these hearsay statements, the trial judge was ignoring the admonition of this court in *Glassner* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, to the effect that trial judges should give little weight to bootstrap evidence in deciding whether to admit hearsay under the coconspirator exception. See *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978), footnote 11 at page 1133.

The law is clear to the effect that there must be sufficient evidence aliunde extra-judicial declarations of co-conspirators establishing the existence of the conspiracy and connecting an accused with it. *United States* v. *Santos,* 385 F.2d 43 (7th Cir. 1967). In the case at bar, the evidence did not show a common purpose to commit the offense charged in the indictment; and, therefore, all testimony of Agent Palma regarding his conversations with Lopez should have been excluded as hearsay.

The fact that the statement of Lopez to Agent Palma that he did not think he could get his people to deliver the heroin without the money was essential in establishing a common purpose or joint venture is apparant from the closing argument of the Government. No less than three times was the importance of this conversation stressed to the jury in the Government's efforts to convince the jury of the defendants' guilt based upon the theories of common venture or agency (T. 458, 459 and 465).

The prosecutor told the jury that part of their theory was that there was some form of an agency between Lopez and the petitioners (T. 458). In arguing that such an agency had been shown, the prosecutor stated:

> "First of all you remember that Agent Palma testified that when he was in the Fran's Tavern

> talking to Lopez, that Lopez wouldn't give him a definite agreement that he would in fact deliver the heroin to Agent Palma without first receiving at least one half of the money first. *He said he'd have to go back to talk to his people—the sources of the heroin.*" (Emphasis Added)

Later, the prosecutor said (T. 459):

> "*In fact Lopez says he had to go see his people.* He was followed directly to the El Farol Tavern. He never left that tavern except for a brief period around 1:45, I believe it was, when he came out of the tavern, went into the car and went back into the tavern. *Agent Palma was still at Fran's Tavern waiting for some word from Lopez as to whether he had met with the people, and whether he could in fact deliver to him the heroin without having to put up the money in front first.*" (Emphasis Added)

Finally, the hearsay statements testified to by Agent Palma were argued to the jury as follows (T. 465-466):

> "There are three categories of evidence that you have heard which tends to indicate and which do indicate that the Defendants knew they were participating in the distribution of heroin. First of all there's the act of Lopez; second there's the act of the Defendants themselves; and third, there's the general circumstances and events surrounding both of those acts. We know that Lopez clearly met someone. He went into the El Farol Tavern: *he told Agent Palma that he was going to talk to his people and let him know later* whether or not—
>
> Mr. Levin: Objection.
>
> Mr. Agran: Objection, Judge.
>
> Mr. Levin: Objection.
>
> The Court: Objection overruled.
>
> Mr. Stefun: The logical inference based on the fact that Anastacio, Raul and Raphael all come out of

the El Farol Tavern together only five minutes later after Lopez had called Palma and told him that the delivery was set, to please wait and he would be with him in about an hour, is that these Defendants were the ones that Lopez was meeing in the El Farol Tavern. And that they were in fact the ones who were providing him with that heroin. So, in other words, these arrangements were finalized in the El Farol Tavern and Lopez let Agent Palma know that fact when he called him from the tavern where Agent Palma was waiting at Fran's Tavern." (Emphasis added)

Clearly, the admission of these statements into evidence was violative of the petitioners' rights pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. Petitioners' Sixth Amendment Rights Were Violated As A Result Of The Trial Judge Advising The Prospective Jurors During Voir Dire That The Petitioners Were Mexican Citizens.

Without being requested by the defense, the trial judge in the case at bar abused his discretion by advising the prospective jurors during voir dire that the petitioners were Mexican citizens and not citizens of the United States (T. 12-13, 37). Normally, an accused complains because of the failure of the trial judge to ask certain questions to determine the possibility of prejudice on the part of the prospective jurors. However, in the case at bar, the petitioners complain that the trial judge exceeded the bounds of propriety by advising the jury of a fact that was not brought out during the trial and which was not an issue before the court.

Although upon request an accused must be permitted sufficient inquiry into the background and attitudes of

the jurors to enable him to intelligently exercise his peremptory challenges, *United States* v. *Dellinger,* 472 F.2d 340, 368 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), the trial judge should not advise the prospective jurors of collateral issues without a specific request from the defendant.

Concededly, a trial judge retains a broad discretion as to questions which may be addressed to prospective jurors on voir dire examination; however, exercise of that discretion is subject to essential demands of fairness. See *Aldridge* v. *United States,* 283 U.S. 308, 51 S.Ct. 470 (1931).

The lower court's opinion is contrary to its ruling in *United States* v. *Daily,* 139 F.2d 7 (7th Cir. 1943) wherein it stated that it was the duty of the trial court to see that during the voir dire examination no collateral or unrelated issue is brought into the case. In the *Daily* case the Seventh Circuit held that the defendant's religion and whether or not he was a minister regularly ordained by his creed or sect were not matters in issue; and, therefore, it was not proper to inquire of the venire about its views as to these matters.

Likewise, in the case at bar, the petitioners' citizenship was not in issue before the court; and, therefore, it was not necessary to advise the venire that the petitioners were Mexican citizens, a matter that was foreign to the issue for trial.

The statement by the trial judge to the jury that the petitioners were Mexican citizens was especially prejudicial to the petitioners as the facts in the case at bar developed. Although alienage was not an issue, the revelation of their Mexican citizenry was damaging in that

Agent Palma testified that Lopez told him that he received regular shipments of heroin from Mexico (T. 174-175). With the knowledge that the petitioners were Mexican citizens, the jurors in the case at bar could only have concluded that it was these petitioners who brought heroin to Lopez on a regular basis from Mexico, and thus the jury was undoubtedly led to convict them because it thought their character was such that they frequently committed crimes.

In the case at bar, the fact that the petitioners were of Mexican or Latino descent was obvious from their names. If the trial judge believed the jurors might have a bias or prejudice against persons with such an ancestry, his inquiry should have been limited to inquiring whether the jurors had any feelings toward persons of Mexican or Latino descent which might cause them to be less than fair and impartial. See *United States* v. *Mendoza,* 574 F.2d 1373, 1381 (5th Cir. 1978). Absent a request from the petitioners there was no need for the trial judge to also advise the jurors that the petitioners were Mexican citizens and not American citizens. Advising the jury that they were also Mexican citizens was not essential in trying to screen out jurors with preconceived biases and was, in fact, prejudicial to their right to receive a fair trial as guaranteed by the Sixth Amendment to the Constitution.

3. The Government Failed To Prove The Crime Charged In The Indictment.

In the instant indictment the petitioners were charged along with one Augustin Lopez-Morales (Lopez) with having distributed approximately 1998.08 grams of heroin on or about March 2, 1978. The indictment did not allege the name of the person to whom the heroin was distributed, but it was the Government's theory of the case that the distribution was made to Cesar Palma, a DEA agent.

Although the evidence adduced at the trial of this cause may have shown that the petitioners distributed the substance to Lopez, it did not show that the petitioners participated in the distribution to Palma. The trial court record failed to show that the petitioners ever had any discussions with Palma or anyone else concerning narcotics nor were they present when Lopez was having negotiations with Palma. The record also failed to show that they had any knowledge of the fact that the heroin was ultimately to be distributed to Palma. Therefore, the Government failed to prove the charge in the indictment beyond a reasonable doubt as to these petitioners.

In affirming the convictions of the petitioners the court below totally ignored the authorities cited by petitioners in support of their argument that there was a failure of proof, and that they were not liable for any criminal conduct subsequently committed by Lopez with the heroin after it was distributed to him.

The factual situation in the case at bar is very similar to that of *People* v. *Bueno,* 35 Ill.2d 545, 221 N.E.2d 270 (1966) and the other cases referred to in that opinion by the Supreme Court of Illinois.

In the *Bueno* case, the defendant and one Wright were indicted for the illegal sale of narcotics to Nicoletti. Wright was arrested after he handed Nicoletti a package containing narcotics. Wright gave Nicoletti a description of the person from whom he had received the narcotics, and upon arresting and searching Bueno, the police found the money that they had previously given Wright.

In reversing the conviction of Bueno, the Supreme Court of Illinois stated:

> ". . . There was no evidence that the defendant had any knowledge that Nicoletti was the ultimate purchaser and at the most the evidence showed a sale by the defendant to Wright, a crime which was not charged in the indictment.
>
> The State has argued this case as if the issue involved was a question of variance between the indictment and the proof and relies upon the rule that such a variance is not fatal unless substantial prejudice to the defendant can be shown. We believe this principle is inapplicable here. The question is not one of variance but of whether the State proved the charge set forth in the indictment. (Cf. People v. Cohen, 352 Ill. 380, 383, 185 N.E. 608, 88 A.L.R. 481.) This the State failed to do and the judgment of the criminal court of Cook County is reversed." 221 N.E. 2d at page 271.

To the same effect, see *People* v. *Davis,* 13 Ill.2d 211, 148 N.E.2d 771 and *People* v. *Sullivan,* 23 Ill.2d 582, 179 N.E.2d 634.

In the *Davis* case, the defendant was charged with the sale of narcotics to White. White, who had been arrested for possession of narcotics, was supplied with money by the police for the purpose of purchasing narcotics. White gave the money to one Coleman who in turn gave the money to the defendant in exchange for a package of narcotics which Coleman then gave to White. In reversing the defendant's conviction, the Supreme Court of Illinois stated:

> "There is a complete absence of any evidence of a sale of narcotic drugs by the defendant to Raymond White. Nothing indicates that White and Davis ever met, or had any dealings with one another. Any sale

> of narcotic drugs by defendant, so far as this record indicates, was to Lavera Coleman. There is no showing that Coleman was an agent or intermediary of defendant. White testified he had never purchased narcotics from or through Coleman previously, nor is there any testimony that he even knew that Coleman could procure narcotics for him, other than that he knew her to be a 'user'. In all of the testimony relative to the transaction, Coleman purported at all times to be acting for herself alone in making the purchase. White was never in the company of Coleman when she conducted any part of the transaction for the purchase of the narcotic.
>
> The People depend entirely on one statement by Davis to the police to indicate that he knew the narcotics were being sold to White, a minor. When arrested, officer Sims testified that Davis 'popped' his fingers and said 'Doggone it, I knew that guy in the white coat was wrong,' and that White wore a white or cream colored trench coat on the night of the alleged occurrence. To infer from this remote and unexplained statement that Davis sold narcotics to White is a most strained and uncorroborated application of the evidence, and hardly serves to extinguish doubt.
>
> The crime for which defendant was indicted and convicted was that of selling narcotic drugs to a minor, Raymond White. This court cannot and does not condone the illicit trade in narcotic drugs, but the evidence in this case falls to sustain the crime charged. It may well establish a sale of narcotic drugs in violation of the Uniform Narcotic Drug Act of this State. However, we are not called upon to decide that issue, but to determine if the crime of selling narcotic drugs to a minor is proved beyond reasonable doubt. It is incumbent upon the People to prove beyond a reasonable doubt each of the elements necessary to constitute the crime charged. People v. Becker, 414 Ill. 291, 111 N.E.2d 491. They have failed to prove a sale to the minor, Raymond White,

by the defendant. Consequently, the conviction cannot stand, and the judgment must be reversed." 148 N.E.2d at page 773.

Likewise in the case at bar, nothing in the record indicates that the petitioners and Agent Palma ever met or had any dealings with one another. Any distribution of narcotics by them, so far as the record indicates, was to Lopez.

Applying the principles of the foregoing cases to the instant case, it is clear that the Government failed to prove the charge set forth in the indictment since, at most, the evidence in the case at bar showed a distribution of a controlled substance by the petitioners to Lopez, a crime which was not charged in the indictment.

The ruling of the court below is also in conflict with decisions of other circuits. In the case of *United States* v. *Peoni,* 100 F.2d 401 (2d Cir. 1938), Peoni sold counterfeit bills to Regno and Regno resold them to Dorsey. All three knew that the bills were counterfeit, and Dorsey was arrested while trying to pass them. In reversing Peoni's conviction, the Second Circuit stated at page 403:

> "The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later.

> Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy though that doctrine too is often abused."

Applying the principles of the *Peoni* case to the facts in the instant case, assuming that the three petitioners agreed that the heroin should be distributed to Lopez, there is nothing to indicate that they also agreed with Lopez that the heroin should be distributed to Agent Palma.

This principle was also quoted with approval by the Ninth Circuit in the case of *United States* v. *Hernandez-Carreras,* 451 F.2d 1315 (9th Cir. 1971), wherein the court held that a conspiracy to sell drugs could not be based on testimony that the defendant promised to sell a buyer drugs when he acquired the drugs from his source. The court stated at page 1316:

> "It amounts to saying that if A (Palma) asks B (Lopez) to sell contraband, and B says he will get it from C (Esparzas), B can be convicted of conspiring with C to sell to A. That does not follow. C may know that B intends to resell, or he may not. Even if he does, that alone does not make him party to a conspiracy to sell to A."

See also *United States* v. *Spanos,* 462 F.2d 1012, 1015-1017 (9th Cir. 1972).

The ruling of the court below also appears to be in conflict with its earlier decision in the case of *United States* v. *Greer,* 467 F.2d 1064 (7th Cir. 1972). In the *Greer* case, Greer along with others was indicted for the crimes of conspiracy and interstate transportation of stolen property. In holding that Greer's conviction on the substantive count was improper, the Seventh Circuit stated:

> "Accomplice liability is necessarily limited by the general principles of criminal liability. To allow a jury to infer an intent to aid in the commission of one offense from the demonstrated intent to aid in another earlier offense because the later crime is a foreseeable consequence of the earlier one, is to base criminal liability only on a showing of negligence rather than criminal intent. . . .
>
> Greer's participation was limited to triggering the theft by providing the thieves with information about the copper. Young testified that Greer alerted him to the existence of the copper, described its location, and later, after the theft, phoned him in order to claim the proceeds. Since the Government does not claim Greer was physically present at the crime, Greer's participation amounts to that of an 'accessory before the fact.' As such, in order to prove Greer's complicity with the later stages of the crime —namely, the transportation of the goods—the Government must show that he intended to aid in post-theft plans, or that he knew details of the thieves' travel plans, such as the specific destination of the goods. Since the Government made no such showing, we find the proof insufficient to sustain a conviction on this count." 467 F.2d at page 1069.

Based upon the principles of the *Greer* case, in order to prove the petitioners' complicity with the later stages

of the crime—namely, the distribution to Palma—the Government must show that the petitioners intended to aid in post distribution to Lopez plans, or that they knew details of Lopez' plans, such as the specific distribution of the heroin to Palma. Since the Government made no such showing in the case at bar, the proof was insufficient.

The statement of the Seventh Circuit to the effect that "Lopez tried to get advance money from Palma so that he could pay his people for the heroin" is also indicative of the fact that there were two separate and distinct transactions involved here, one in which Lopez was buying heroin from his source and another in which he was selling to Palma.

Therefore, the convictions of the petitioners cannot be sustained because the Government proved something it did not charge, and did not prove beyond a reasonable doubt what it did charge.

4. The Standard Applied By The Court Below In Determining The Sufficiency Of Circumstantial Evidence To Support A Conviction Is In Conflict With That Of Other Circuits.

Since there was no direct evidence establishing that the petitioners knew Lopez was going to distribute the heroin to Palma or that they knew the packages transferred from the Toronado to the Chevrolet contained heroin, it is necessary to determine whether or not the circumstantial evidence in the case was sufficient to establish the essential element of knowledge.

In its opinion the court below, relying on its decision in the case of *United States* v. *Fearn,* 589 F.2d 1316 (7th Cir. 1978) stated that the test for determining the sufficiency of the evidence is whether "the jury might rea-

sonably conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence." The *Fearn* case, rather than dealing with the sufficiency of circumstantial evidence, dealt with the standard to be applied in determining whether the Government's evidence was sufficient to withstand a motion for judgment of acquittal.

Other circuits have applied a different standard in reviewing the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in circumstantial evidence cases. In *United States* v. *Hines,* 563 F.2d 737 (5th Cir. 1977) the Fifth Circuit stated that in reviewing the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in a circumstantial evidence case, the test is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt.

In the case of *United States* v. *Wages,* 458 F.2d 1270 (6th Cir. 1972), the Sixth Circuit stated that when the prosecution finds it necessary to establish one of the essential elements of the crime by circumstantial evidence, that evidence and the reasonable inference to be drawn therefrom must not only be consistent with guilt but inconsistent with innocence.

In the case of *Tri-Angle Club, Inc.* v. *United States,* 265 F.2d 829, 833 (8th Cir. 1959), the Eighth Circuit stated that where the evidence for conviction is circumstantial, all the circumstances proved must be consistent with each other, consistent with the hypothesis that the assused is guilty, and inconsistent with every reasonable hypothesis except that of guilt.

The Ninth Circuit has also held that while circumstantial evidence may support a conviction, it must be adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt. See *Whaley* v. *United States,* 362 F.2d 938 (9th Cir. 1966).

In the cases of *Brumbelow* v. *United States,* 323 F.2d 703 (10th Cir. 1963) and *Tyler* v. *United States,* 323 F.2d 711 (10th Cir. 1963), the Tenth Circuit held that even if the proof of circumstances of a case may be consistent with guilt but is not inconsistent with innocence, it will not support a conviction.

The record in the case at bar is completely silent as to any direct evidence establishing the essential element that the petitioners knew that the packages contained heroin. Nor does any of the circumstantial evidence warrant such an inference.

The packages containing the heroin were wrapped in a masking tape so that the contents of the taped packages were not obvious and could not have been determined by the petitioners unless they had been advised by someone or had made their own investigation, neither of which was shown in the trial court. The prosecution admitted in closing argument that there wasn't "anything particularly suspicious about masking tape wrapped brick-size packages" (T. 528).

There was no showing that any negotiations or conversations were carried on in their presence which would have given them knowledge of a heroin transaction.

None of the activities of the petitioners were done in a surreptitious or suspicious manner from which knowledge could be inferred. There was nothing secretive about the transfer of the packages from the Toronado to the Chevrolet since it took place in broad daylight on a pre-

dominately residential street (T. 228) at a time when other cars were on the street and other people were walking up and down the street (T. 356-357).

The court below's characterization of one of the petitioners acting as a "look-out" during the transfer is unwarranted from the evidence inasmuch as Raphael was werely described as looking northward while the transfer was taking place. Had he been acting as a look-out, he would have been glancing in all directions rather than only looking in one fixed direction.

The fact that the automobile containing $56,000 worth of heroin was left on the street with the keys in it also negates guilty knowledge on the part of the petitioners. In this day and age of frequent automobile thefts it seems absurd to believe that a person would knowingly leave an automobile loaded with such a large quantity of heroin unattended with the keys in it especially in view of the fact that anyone could have seen the putting of the packages into the Chevrolet's trunk.

The circumstantial evidence offered by the Government in the case at bar in support of its effort to show knowledge on part of the petitioners was insufficient to justify any inference that they had knowledge of the contents of the packages. Absent such a permissible inference there is no evidence to support their conviction. Proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction since evidence which is consistent with two conflicting hypotheses tends to prove neither. *Cox* v. *United States,* 96 F.2d 41 (8th Cir. 1938).

The record in this cause does not reveal any activities on the part of the petitioners which are not inconsistent

with their lack of knowledge of the contents of the packages in question.

From the evidence presented at the trial, it is just as reasonable to conclude that the petitioners were merely doing an innocent favor for an acquaintance without knowledge of the fact that they were engaging in an illegal transaction.

Reliance by the court below on the case of *United States* v. *Sutton,* 446 F.2d 916 (9th Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972) is misplaced because the statute under which the defendant was convicted in *Sutton,* Title 21, United States Code, Section 176a, made unexplained possession of marihuana sufficient evidence for conviction. There is no such presumption in the statute, Title 21, United States Code, Section 841(a)(1), which the petitioners were convicted of in the case at bar.

Since there appears to be a conflict among the various circuits as to the standard to be applied in determining whether circumstantial evidence is sufficient to establish an essential element of a crime, this court should adopt a standard to be used uniformly by the courts.

5. The Closing Argument Of The Government Was An Improper Comment On Petitioners' Failure To Testify.

During closing argument, the prosecutor made the following improper remark to the jury (T. 460):

> ". . . There was no testimony that Anastacio had any problems getting into the car, in fact, he started the car up and drove to the 2600 block of South Kildare.
>
> There is an inference in the fact that you as jurors may draw that when Lopez came out at 1:45, perhaps

he was leaving the keys in the car. *At any rate, it is questionable and you could expect or at least look to see if Defense Counsel offered some sort of information or explanation for how Anastacio could possibly get into the car —*

Mr. Levin: Objection.

Ms. Levin: Objection.

Mr. Agran: Objection. We don't have to offer anything.

The Court: That's true, sustained. The jury will disregard that comment.'' (Emphasis Added)

Since only the petitioners themselves could have offered the explanation suggested by the prosecutor, and the petitioners chose not to testify in their own behalf during the trial, this line of argument on behalf of the prosecution constituted an improper comment by the Government on the petitioners' failure to testify notwithstanding the fact that the trial judge immediately sustained their objection to the comment and instructed the jury to disregard it.

However, the harm was done, and it is very unlikely that a mere admonition to the jury to disregard this comment could eradicate its harmful effects from the jury's minds. The failure of the petitioners to explain circumstance suggested by the prosecutor could very well have affected the jury's verdict in this case.

See the case of *United States* v. *Clarke,* (3rd Cir. 1965) 343 F.2d 90, wherein the court held that a prompt admonition by the trial judge to the jury to disregard improper evidence was insufficient to eradicate the prejudicial effects of the testimony. In reversing the defendant's conviction the court stated at page 92:

''The trial judge's view, that his 'prompt and direct' admonition to the jury to disregard the properly

stricken challenged statements of Ripa, 'removed any possible prejudice * * * in the jury's mind' brings to mind the immortal lines:

'The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit,
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it.'

Rubaiyat, Stanza 71''

This type of comment is clearly within the principles enunciated by this court in *Griffin* v. *California,* 380 U.S. 609, 85 S.Ct. 1229 (1965).

This comment called attention to petitioners' failure to testify and offer an explanation relating to the keys for Lopez' car. It had the effect of attempting to abrogate the presumption of their innocence and invited the jury to draw an inference supporting guilt unless they offered the explanation suggested by the prosecutor. Clearly, the prosecutor was attempting to whittle away their constitutional rights to remain silent and the well established principle that an accused is not required to offer any evidence whatsoever in support of his guaranteed presumption of innocence.

The court below has in other instances recognized the fact that it is improper for a prosecutor in closing argument to comment in such a fashion so as to improperly draw attention to a defendant's failure to testify. See *United States* v. *Poole,* 379 F.2d 645 (7th Cir. 1967) and *United States* v. *Handman,* 447 F.2d 853 (7th Cir. 1971).

See also the case of *United States* v. *Smith,* 500 F.2d 293 (6th Cir. 1974), which held that the prosecutor's statement in closing argument to the jury requiring the defendants to present a ''reasonable explanation'' of taped wiretap evidence was improper. In reversing the convic-

tions of the defendants notwithstanding the cautionary instruction given to the jury by the trial judge, the Sixth Circuit stated at pages 295-296:

> "The challenged comments of the prosecutor were clearly improper argument. It is, of course, the duty of the prosecutor to advance the government's cause with force and with persuasiveness. However, this duty includes concerns in addition to mere advocacy. To the prosecutor is also entrusted the responsibility of observing in practice the principles considered under our system to be essential to a fair and just criminal procedure. To be sure, this responsibility is shared with the judiciary, with the bar, and with others. But the duty not to derogate from a fair and impartial criminal procedure rests, in the first instance, upon the shoulders of the prosecutor, the representative of our government who presents its proofs in support of its indictments. As Mr. Justice Sutherland observed in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935):
>
> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compeling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold air of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Here, the prosecutor's argument to the jury violated the spirit, at least, of Griffin v. California, 380

> U.S. 609, 85 S.Ct. 1229, 14 L.Ed2d 106 (1965). In that case the Supreme Court held that a prosecutor's similar comment to a jury, with the acquiescence of the court, in a state criminal trial violated the defendant's Fifth Amendment privilege against self-incrimination. Although the element of acquiescence by the court is missing here, nevertheless, we conclude that the prosecutor's statement alone prejudiced appellants' right to a fair trial. Because this case is before us on direct appeal, we base our decision on our supervisory powers over criminal trials within this circuit and therefore find it unnecessary to decide whether the improper comments also constituted a constitutional violation. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974)."

The court in the *Smith* case also determined, as this court should, that it was left with "grave doubt" that the error did not have "substantial influence" upon the jury's verdict pursuant to the principles enunciated in *Kotteakos* v. *United States,* 328 U.S. 750, 66 S.Ct. 1239 (1945).

Therefore, the error in the prosecutor's closing argument requesting that the jury seek an explanation from the petitioners was not harmless.

The court below's reference to the fact that the petitioners were not the only persons who could have challenged or contradicted the evidence is unwarranted because Lopez was not available. At the outset of the trial of this case, the trial judge, at the Government's request, issued a bench warrant for Lopez' arrest because he had left the jurisdiction of the court and was observed in El Paso, Texas (T. 25-27).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit should be granted.

Respectully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued: November 6, 1979
January 14, 1980.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

No. 79-1400

RAPHAEL ESPARZA-CORRAL, RAUL ESPARZA-CORRAL and ANASTACIO ESPARZA-CORAL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 CR 131
John F. Grady, *Judge.*

ORDER

Defendants appeal from their convictions for distributing heroin in violation of 21 U.S.C. § 841(a)(1). They urge that we reverse the convictions (1) because the court improperly admitted hearsay testimony, (2) because the

* Senior District Judge Edward Dumbauld of the United States District Court for the Western District of Pennsylvania is sitting by designation.

Government made an improper and prejudicial closing argument, (3) because the trial judge improperly advised the jury during voir dire that defendants were Mexican citizens and (4) because the evidence presented at trial was not sufficient to sustain their convictions. We find all of defendants' objections without merit and affirm the judgment below.

I

Defendants argue that the admission of testimony relating to conversations between Augustin Lopez-Morales, an indicted co-defendant who pled guilty prior to trial, and Cesar Palma, the Federal Drug Enforcement Administration (DEA) agent who negotiated to buy heroin from Lopez, was improperly admitted hearsay. Contrary to the conclusion reached by the trial judge, defendants argue that there was no independent evidence that they were involved with Lopez in a joint venture to distribute heroin to Palma. At best, defendants argue, the evidence showed two separate and distinct distributions: one between Lopez and Palma and one between Lopez and defendants. Moreover, they argue that the admission of the testimony relating to conversations between Lopez and Palma was reversible error, since it was the only evidence that linked them to the distribution charged in the indictment.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement made by a coconspirator during the course and in furtherance of a conspiracy is not hearsay to be excluded under Rule 802. In *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978), this court recently clarified the standard to be employed by the trial judge in determining whether there has been sufficient evidence of a conspiracy or joint venture to warrant admission of certain testimony:

> [I]f it is more likely than not that the defendant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible."

Id. at 1134 [citation omitted].

The Government correctly points out that there was sufficient independent evidence presented at trial to meet the *Santiago* burden. The circumstances of the transaction between Lopez and defendants suggest concerted action. Lopez entered a tavern; forty-five minutes later, the defendants left that same tavern, with one of them driving Lopez's car and the other two following in a second car. They parked the cars less than a mile from the tavern and transferred packages of heroin from the second car to Lopez's car. They then abandoned Lopez's car with the keys inside, and all three defendants drove away in the second car. A few minutes later, Lopez retrieved his car. As the Government points out in its brief, "if Lopez and defendants were *not* working together [it is unlikely] that Lopez would give the Esparzas in advance some $50,000 and his car and then trust them to subsequently deliver the heroin, or that the Esparzas would put $50,000 worth of heroin in Lopez's car and then trust Lopez to later deliver the money." Government's Brief at 9-10 (emphasis in original). Consequently, we agree with the trial court that a preponderance of the evidence, independent of testimony about conversations between Palma and Lopez, suggests a joint venture.

II

The defendants also argue that the Government's closing argument was prejudicial. In discussing defendant's leaving the tavern in Lopez's car, the prosecutor said:

> There was no testimony that Anastacio [Esparza-Corral] had any problems getting into the car, in fact he started the car up and drove to the 2600 block of South Kildare.
>
> There is an inference in the fact that you as jurors may draw that when Lopez came out at 1:45, perhaps

he was leaving the keys in the car. At any rate, it is questionable and you could expect or at least look to see if Defense Counsel offered some sort of information or explanation for how Anastacio could possibly get into the car—

Mr. Levin: Objection.

Ms. Levin: Objection.

Mr. Agran: Objection. We don't have to offer anything.

The Court: That's true, sustained. The jury will disregard that comment.

Transcript at 460. Defendants argue that only they could have offered the explanation suggested by the prosecutor, so that the prosecutor's statement was tantamount to an improper comment on their failure to testify. We disagree.

This court has held that the Government's reference to evidence as "uncontradicted and uncontested" could not necessarily be taken by the jury as a comment on a defendant's failure to testify. See *United States* v. *Lyon,* 397 F.2d 505, 509 (7th Cir.), *cert. denied sub nom. Lysczyk* v. *United States,* 393 U.S. 846 (1968). Likewise, the prosecutor's reference in this case to the defense counsel's failure to present evidence could not necessarily be taken by the jury as a comment on the defendants' failure to testify. Moreover, we have held that there is no impermissible reference to a defendant's failure to testify where he was not the only person who could have challenged or contradicted certain evidence, see *United States* v. *Bartemio,* 547 F.2d 341, 346 (7th Cir. 1976); *United States* v. *Handman,* 447 F.2d 853, 855 (7th Cir. 1971), and, in this case, Lopez could have testified on the matter.

In any event, the ill effects of any ambiguities in the prosecutor's statement were corrected by the trial judge's prompt admonition to the jury. See *Bartemio,* 547 F.2d at 356; *Handman,* 447 F.2d at 855.

III.

Defendants further urge that the trial court abused its discretion in advising the jury during voir dire that defendants were Mexican citizens. They contend that their alienage was unrelated to any issue in the case and was consequently prejudicial. We disagree with defendants and hold that, rather than being prejudicial, the trial court's questions to the prospective jurors were exceedingly proper. After stating that defendants were Mexican citizens, the trial judge asked whether any of the prospective jurors had feelings toward Mexican or Latino people which might cause them to be less than fair and impartial. As this court recognized in *United States* v. *Dellinger,* 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973), there are some questions which may appear tangential to the trial but which are so integral to a juror's view of the case that they must be explored. In this case, defendants were obviously of Spanish ancestry and the trial judge acted properly in trying to screen out jurors with preconceived biases.

IV.

Defendants also argue that the evidence was insufficient, both to sustain a conviction for the crime charged in the indictment and to prove beyond a reasonable doubt that they knew the packages contained heroin. Again, we find their objections without merit.

As this court recently stated in *United States* v. *Fearn,* 589 F.2d 1316 (7th Cir. 1978):

> [Sufficiency of the evidence] is tested in the Seventh Circuit by the standard of whether substantial evidence, taken in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), tends to show that the defendant is guilty beyond a reasonable doubt. *United States* v. *Williams,* 311 F.2d 721, 723 (7th Cir. 1963).

Id. at 1320-21. Phrased another way, there is sufficient evidence to sustain a defendant's conviction where "the jury might reasonably conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence." *Id.* at 1321 [citation omitted]. Measured against these guidelines, defendants' convictions must stand.

Although defendants strongly argue that the evidence failed to link them to the distribution to Palma, the evidence viewed as a whole supports the jury's verdict against them. As we stated in Part I, *ante,* there was, at least by a preponderance of the evidence, ample indication that defendants were engaged in a joint venture with Lopez. Adding the testimony about conversations between Lopez and Palma, "the jury might reasonably conclude that the evidence is inconsistent with the hypothesis of [defendants'] innocence." Lopez tried to get advance money from Palma so that he could pay his people for the heroin; it was clear that he was not working alone. Defendants were then seen putting packages of heroin into Lopez's car. Taking the evidence in a light most favorable to the Government, we believe the jury could properly have found the defendants guilty beyond a reasonable doubt.

Defendants' argument that the evidence was insufficient to show they knew the packages contained heroin must fail for the same reason. Their activities during the transfer to Lopez's car, including one of the defendant's acting as a look-out, coupled with their possession of the car from which the packages of heroin were transferred, see *United States* v. *Sutton,* 446 F.2d 916, 920 (9th Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972) supports the jury's verdict.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 8, 1980.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge*•

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RAPHAEL ESPARZA-CORRAL, RAUL ESPARZA-CORRAL and ANASTACIO ESPARZA-CORRAL,
Defendants-Appellants.

No. 79-1400

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 CR 131

JOHN F. GRADY, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

• Senior District Judge Edward Dumbauld of the United States District Court for the Western District of Pennsylvania is sitting by designation.